

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

OKMULGEE COUNTY RURAL WATER)
DISTRICT NO. 2, an agency)
and legally constituted)
authority of the State of)
Oklahoma,)
)
Plaintiff,)
)
v.) Case No. CIV-06-167-KEW
)
CITY OF OKMULGEE,)
an Oklahoma Municipality;)
and THE OKMULGEE PUBLIC)
WORKS AUTHORITY,)
a public trust; and the)
UNITED STATES DEPARTMENT)
OF AGRICULTURE,)
)
Defendants.)

OPINION AND ORDER

This matter comes before the Court on Defendants City of Okmulgee and the Okmulgee Public Works Authority's Motion to Dismiss Plaintiff's Second Amended Complaint filed August 14, 2006 (Docket Entry #35). A response and reply have been filed in a timely manner.

In this Motion, Defendants City of Okmulgee and the Okmulgee Public Works Authority ("Okmulgee Defendants") raise a single issue for consideration of the dismissal of a large portion of this case. The Okmulgee Defendants allege that the parties entered into a contractual agreement prior to the filing of this action which permitted the Okmulgee Defendants to provide water to customers that are otherwise located within Plaintiff's

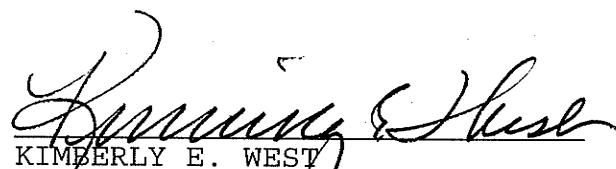
protected territory. Thus, the Okmulgee Defendants contend Plaintiff has waived any right to enforce the protections afforded by 7 U.S.C. § 1926(b). The dismissal of any claims prior to the date of the agreement would result in the adjudication of Plaintiff's rights to recover proceeds realized by Defendants from a single customer, the Okmulgee Defendants' right to continue to service this customer and Plaintiff's ability to serve the customer.

Clearly, this Court would normally be required to convert the subject Motion into one seeking summary judgment relief, given the numerous documents referenced in the briefs outside of the initial pleadings. Fed. R. Civ. P. 12(b)(6). However, conversion is unnecessary in this case due to the fact that the Okmulgee Defendants filed a motion for summary judgment subsequent to the subject motion which raises precisely the same issue. As a result, this Court will defer to that motion in resolving the matter on the merits and deny the subject motion.

IT IS THEREFORE ORDERED that Defendants City of Okmulgee and the Okmulgee Public Works Authority's Motion to Dismiss Plaintiff's Second Amended Complaint filed August 14, 2006 (Docket Entry #35) is hereby **DENIED**, based solely upon the pendency of the Okmulgee Defendants' motion for summary judgment which represents the better avenue to address the merits of

Defendants' arguments.

IT IS SO ORDERED this 30th day of January, 2007.


KIMBERLY E. WEST
UNITED STATES MAGISTRATE JUDGE